

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“B” BENCH : BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE-PRESIDENT  
AND SHRI A.K.GARODIA, ACCOUNTANT MEMBER**

<b>ITA No. 2130/Bang/2017</b>
<b>Assessment year: 2011-12</b>

M/s.Indecomm Global Services (India) Pvt.Ltd., 4 <sup>th</sup> Floor, Maruti Infotech Building, Amarjyothi Layout, Inner Ring Road, Domlur, Bengaluru – 560 071. <b>PAN: AABCB 6817 E</b>	Vs.	The Deputy Commissioner of Income Tax, Circle 3(1)(1), Room No.227, 2 <sup>nd</sup> floor, BMTC Building, 80 Feet Road, Koramangala, 6 <sup>th</sup> Block, Bengaluru - 560095.
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>ITA No.2588/Bang/2017</b>
<b>Assessment year : 2011-12</b>

The Deputy Commissioner of Income Tax, Circle 3(1)(1), Room No.227, 2 <sup>nd</sup> floor, BMTC Building, 80 Feet Road, Koramangala, 6 <sup>th</sup> Block, Bangalore-560095.	Vs.	M/s.Indecomm Global Services (India) Pvt.Ltd., Indecomm House, No.30, Laskar Hosur road, Adugodi, Bangalore – 560 030. <b>PAN: AABCB 6817 E</b>
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Assessee by</b>	<b>:</b>	<b>Shri K.R.Vasudevan, Advocate</b>
<b>Respondent by</b>	<b>:</b>	<b>Smt.Neera Malhotra, CIT(DR)(ITAT), Bengaluru.</b>

<b>Date of hearing</b>	<b>:</b>	<b>21.11.2019</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>27.11.2019</b>

**ORDER**

*Per N.V. Vasudevan, Vice-President*

ITA No2130/B/17 and 2588/B/17 are cross appeals filed by the assessee and revenue respectively for the assessment year 2011-12 and the appeals are directed against the Order of CIT(A)-3, Bengaluru, dated 1.9.2017.

2. The brief facts relating to these appeals are that the Assessee is in the business of rendering Software Development Services (SWD services) and Information Technology Enabled Services (ITES) to its Associated Enterprise(AE) which is non-resident at cost plus 10% mark up. It is not in dispute that the transaction of rendering of SWD services and ITES to its AE were international transactions and in view of the provisions of sec. 92 of the Income Tax Act, 1961 (Act), income arising from such international transactions has to be determined having regard to Arms Length Price (ALP). The issues to be decided in the cross appeals are determination of ALP of the international transaction of providing SWD services and ITES by the Assessee to its AE.

3. We will first deal with dispute with regard to determination of ALP in providing SWD services. During the previous year 2010-11 relevant to the assessment year 2011-12, the Assessee rendered software development (technical support) to its AEs. As regards the international transaction of provision of software development (SWD) services to its AEs, the Assessee received consideration of Rs.47,51,99,133/- for rendering Software Development Services from its AE. In support of its claim that the price charged by it in the international transaction the Assessee filed a Transfer Pricing study (TP Study) in which the Assessee adopted Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM) for determination of ALP. The profit level indicator (PLI) chosen for the purpose of comparison of profit margin of comparable companies was operating profit to operating cost (OP/OC). The price charged in the international transaction by the Assessee from its AE was Rs.47,51,99,133. The Operating cost of the Assessee was Rs.43,96,19,595/-. The operating profit was thus Rs.3,55,79,538. OP/OC was 8.09%. The Assessee in its TP Study had chosen 13 companies as comparable companies.

4. The arithmetic mean of the profit margin of the 13 companies so selected by the Assessee compared to the profit margin of the Assessee was at Arm's Length. Since the Assessee's profit margin was within the range of profit margin of the comparables, the Assessee claimed that the price charged in the international transaction was at Arm's Length and therefore no addition by way of adjustment to ALP should be made.

5. The Assessing Officer (AO) referred the question of determination of ALP to the Transfer Pricing Officer (TPO) as is required by the provisions of Sec.92CA of the Act. The TPO after accepting some of the comparable companies chosen by the Assessee, selected 13 comparable companies. The final list of comparable companies and their arithmetic mean profit margin of 24.82% is given at page-17 paragraph-9 of the TPO's order dated 28.1.2015.

6. On the basis of set margin, the price that ought to have been charged in the international transaction of rendering SWD services was computed by the TPO at Rs.54,87,33,178. The Assessee had charged the AE only a sum of RS.47,51,99,133 and the difference of Rs.7,35,34,045/- was added to the total income as addition on account of determination of ALP in SWD services segment. (Paragraph 12.4 at page-36 & 37 of the TPO's order dated 28.1.2015).

7. The addition suggested by the TPO was added to the total income of the Assessee by the AO in the draft order of assessment and the final order of assessment because the Assessee chose not to prefer filing any objections before Disputes Resolution Panel (DRP). The Assessee however preferred appeal before CIT(A), who by the impugned order excluded ICRA Technologies and Tata Elxsi from the final list of comparable companies chosen by the TPO. Thus the comparables that remained after CIT(A)'s

direction was 11 comparable companies out of the 13 comparable companies chosen by the TPO.

8. Though they were several grounds raised by the Assessee in the grounds of appeal, at the time of hearing the learned counsel for the Assessee pressed for adjudication only the following issues, viz., (i) not including one comparable company which it had chosen in its Transfer Pricing Analysis (TP Analysis) viz., LGS Global Ltd.,(relevant ground of appeal being 8.3 of revised grounds of appeal) and (ii) the action of the CIT(A) in not excluding 7 out of the 11 retained as comparable companies by the DRP viz., (a) Acropetal Technologies Ltd., (b) E-Zest Solutions Ltd., (c) Infosys Ltd., (d) Larsen & Toubro Ltd., (e) Persistent Systems & Solutions Ltd., (f) Persistent Systems Ltd., and (g) Sasken Communication Technologies Ltd. The relevant Ground of appeal in Assessee's grounds of appeal is Ground No.8.2 (of revised grounds of appeal).

9. We will first deal with the plea of the Assessee for exclusion of comparable companies chosen by the TPO. The first company which the Assessee seeks exclusion is Accropetal Technologies Ltd. On exclusion of this company, we have heard the rival submissions. We find that the TPO has himself applied a filter for exclusion of companies for the purpose of comparison, viz., revenue from software development service should be more than 75% of the total operating revenue. The admitted factual position is that revenue from software development service of this company was 81.40 Crores out of the total operating revenue of Rs.141 Crores. Thus, the revenue from software development is admittedly less than 75% of the total operating revenue of this company. Therefore, his company has to be excluded from the list of comparable companies. It was also brought to our notice that the ITAT Bangalore in the case of Applied Materials Pvt. Ltd., in IT (TP) A.No.17 & 39/Bang/2016 for AY 2011-12 order dated 21.9.2016 noticing the aforesaid facts excluded this company from the list of

comparable companies in the case of a software development service provider such as the Assessee. The learned DR has however placed reliance on a decision of the ITAT Bangalore Bench in the case of M/S.Telsima Communications Pvt.Ltd. Vs. DCIT IT(T.P.)A.No.304/Bang/2016 order dated 22.2.2019 wherein at paragraph 7.3.2 wherein the question of comparability of this company was set aside to the TPO for consideration afresh. Though the learned counsel for the Assessee submitted that in the present case, all the details are available, we find that the details regarding functional dissimilarity, employee cost filter and 75% revenue from software development filter, were not discussed at the TPO/CIT(A) order with facts and figures. We therefore feel that it would be appropriate to remand the issue for fresh consideration regarding comparability of this company with a SWD services provider such as the Assessee.

10. The Assessee seeks to exclude from the list of comparable company E-Zest Solutions Ltd. The Assessee sought to exclude this company from the list of comparable companies on the ground that this company was functionally different in the sense it was engaged in product engineering and software development, owns inventories etc. and that segmental data was not available. The TPO held that this company was engaged in software development and that this company had only one reportable segment in accordance with Accounting Standard 17. The DRP endorsed the view of the TPO. The Assessee has placed reliance on decision of ITAT Bangalore rendered in the case of Autodesk India Pvt. Ltd. Vs. ACIT IT(TP)A.No.156/Bang/16 for AY 2011-12 order dated 21.12.2018 wherein this company was excluded on the ground that this company was not functionally comparable with a SWD service company. ITAT Bangalore in the case of Applied Materials Pvt. Ltd., a company which was also engaged in providing software development services, in IT (TP) A.No.17 & 39/Bang/2016 for AY 2011-12 order dated 21.9.2016, was pleased to remand the question of exclusion of this company for fresh consideration by the AO/TPO. Respectfully following the decision of the Tribunal in the case of Applied Materials Pvt. Ltd. (supra), we set aside the order of the

TPO/DRP/AO including this company as a comparable company and remand the issue of comparability of this company be considered afresh by the TPO/AO. There is no discussion on the functional comparability of this company in the case of Autodesk India Pvt. Ltd. (supra) and it would be appropriate to follow the decision in the case of Applied Materials Pvt. Ltd.(supra) as was done in the case of Telsima Communications Pvt. Ltd. (supra) which decision was placed before us by the learned DR.

11. The Assessee seeks exclusion of the following 3 companies by placing reliance on the decision of ITAT in the case of Applied Materials Pvt. Ltd., (supra) as well as the case of Autodesk India Pvt. Ltd. (supra). Both the aforesaid companies are also engaged in providing software development services and the decision rendered and cited by the learned AR are rendered for AY 2011-12. The 4 companies which are sought to be excluded are (i) Infosys Ltd., (ii) Larsen & Toubro Infotech Ltd., (iii) Persistent Systems Ltd., In the decision rendered in Autodesk India Pvt. Ltd.,(supra)(vide Paragraph-18) Infosys Ltd., was excluded from the list of comparable companies on the ground that Infosys Ltd., was a giant in the field of SWD services and had brand value and huge turnover and therefore compared with a company with less turnover. In the decision rendered in Autodesk India Pvt. Ltd.,(supra)(vide Paragraph-12) Larsen & Toubro Infotech Ltd., was excluded from the list of comparable companies on the ground that this company had substantial onsite revenue and the revenue from all the 3 segments in which this company was engaged was considered by the TPO. In the decision rendered in Autodesk India Pvt. Ltd.,(supra)(vide Paragraph-26) Persistent Systems Ltd., was excluded from the list of comparable companies on the ground that this company was engaged in diverse activities and there was no segment details available and also for the reason that this company held IPR's indicating that this company was not a pure SWD service company but was also in SWD products. Following the precedent cited, the aforesaid three companies are directed to be excluded from the list of comparable companies.

12. In the decision rendered in Autodesk India Pvt. Ltd.,(supra)(vide Paragraph-27) Sasken Communication Technologies Ltd., exclusion of this company from the list of comparable companies was remanded to the TPO for fresh consideration on the ground that in IT (TP) A.No.17 & 39/Bang/2016 for AY 2011-12 order dated 21.9.2016.

13. In the decision rendered in Autodesk India Pvt. Ltd.,(supra)(vide Paragraph-26) Persistent Systems & Solutions Ltd., was excluded from the list of comparable companies on the ground that this company had diverse businesses and segmental details were not available. The learned DR however relied on decision of ITAT Bangalore rendered in the case of Talsima Communications Pvt. Ltd. (supra), wherein the issue was decided in favour of the revenue holding that the company was into SWD services only and the SWD products are products developed for the client and not developed by Assessee for sale by it as its product.

14. We have considered the rival submissions. The Assessee in support of its claim that this company is engaged in diverse activities has pointed out to page 527, 431, 438, 494, 496 and 518 of the paper book which contains the annual report and financials of this company. The presence of extraordinary events has also been pointed out from the annual report. Presence of R & D activities and existence of IPR's has also been pointed out. In these circumstances and in the absence of a clear finding on the above aspects by the DRP, the general remarks by the TPO based on which the DRP considered this company as a comparable cannot be accepted. It would be appropriate to remand to the TPO the question of comparability of this company afresh in the light of the aspects pointed out by us. We hold and direct accordingly.

15. We now come to the plea of the Assessee for inclusion of LGC Global Ltd. As far as LGC Global Ltd., is concerned, ITAT Bangalore in the case of Applied Materials Pvt. Ltd., a company which was also engaged in providing software development services, in IT (TP) A.No.17 & 39/Bang/2016 for AY 2011-12 order dated 21.9.2016, was pleased to remand the question of inclusion of this company for fresh consideration by the AO/TPO. Respectfully following the decision of the Tribunal, we set aside the order of the TPO/DRP/AO excluding this company as a comparable company and remand the issue of comparability of this company be considered afresh by the TPO/AO.

16. We shall now deal with the revenue's grounds of appeal in the SWD segment (Gr.No. 2). The same is with regard to the action of the CIT(A) in excluding Tata Elxsi and ICRA Techno Analytics Ltd. In the decision rendered in Autodesk India Pvt. Ltd., (supra) (vide Paragraph-20 & 18), this Tribunal has held that ICRA Technologies is not functionally comparable with a SWD services provider and that Tata Elxsi was also not functionally comparable with a SWD service provider as it was engaged in diversified activities. We therefore do not find any merit in Gr.No.2 raised by the revenue. The other grounds with regard to transfer pricing addition contained in Gr. No. 3 & 4 are general and do not require any specific adjudication as no instance of company which was excluded by the DRP on the grounds set out in those grounds have been elaborated. Hence, these grounds are dismissed.

17. We shall now deal with the grounds relating to ITES segment. For rendering ITES to its AE, the Assessee received a sum of Rs.26,09,67,546/-. The operating cost incurred by the Assessee was Rs.22,30,58,893/-. The Operating profit was Rs.3,79,08,653/-. The Operating Profit on Operating Cost was 16.99%. In its Transfer Pricing Study, the Assessee chose the TNMM as the MAM and selected a set of 8 comparable companies. The TPO accepted 3 out of the 8 comparable companies and rejected 5 companies

proposed as comparable companies in the Assessee's Transfer Pricing Study. The TPO on his own chose 7 more comparable companies and arrived at a set of 10 comparable companies, whose average arithmetic mean profit margin was 24.77%. The details of the companies so chosen by the TPO are at page 26 paragraph-9 of the TPO's order. Based on the profit margin of comparable companies chosen by the TPO, the price that the Assessee ought to have received in the international transaction i.e., ALP was determined at Rs.27,83,10,581/-. The Assessee had received a sum of Rs.26,09,67,546/- from its AE for providing ITES. The difference between the ALP and the price received viz., a sum of Rs.1,73,43,035/- was added to the total income of the Assessee on account of adjustment on account of determination of ALP.

18. The addition suggested by the TPO was added to the total income of the Assessee by the AO in the draft order of assessment and the final order of assessment because the Assessee chose not to prefer filing any objections before Disputes Resolution Panel (DRP). The Assessee however preferred appeal before CIT(A), who by the impugned order gave the following directions:

- (i) Acropetal Technologies Ltd.: The TPO had considered Engineering Design Services Segment (EDS) as akin to ITES and doing so was held to be not proper by the CIT(A). The CIT(A) however found that there was a "Health Segment" which had revenue of Rs.10.81 Crores and this segment was akin to medical transcription which was in the nature of ITES and he directed the TPO to consider the segmental margin of this segment and take this company as a comparable company.
- (ii) The TPO excluded Mindtree Ltd., as not comparable company based on the TPO's report in which the TPO conceded that this company was not comparable with ITES.

- (iii) The Assessee sought exclusion of ICRA Online Ltd., Jeevan Scientific Technology Ltd., Infosys BPO Ltd., and iGate Global Solutions Ltd., which was rejected. The Assessee also pleaded for inclusion of certain comparable companies but that request was also rejected.

19. Aggrieved by the order of the CIT(A), the Assessee is in appeal before the Tribunal. Though they were several grounds raised by the Assessee in the grounds of appeal, at the time of hearing the learned counsel for the Assessee pressed for adjudication only the following issue raised in Gr.No.9.1 of the revised grounds of appeal filed before the Tribunal, viz., exclusion of the following companies from the list of comparable companies viz., Acropetal Technologies Ltd., ICRA Online Ltd., Jeevan Scientific Technology Ltd., and iGate Global Solutions Ltd.

20. We have heard the rival submissions on the above issue. As far as Accropetal Technologies Ltd., and Jeevan Scientific Technology Ltd., are concerned, ITAT Bangalore Bench in the case of Swiss Re Shared Services India Pvt. Ltd. Vs. ACIT for AY 2011-12, in the decision reported in (2016) 76 taxmann.com 22 (Bang-Trib), ( a company which is also engaged in providing ITES such as the Assessee), was pleased to hold that these three companies cannot be regarded as comparable companies with companies providing ITES. The learned DR however pointed out that as far as Jeevan Scientific Technology Ltd., is concerned, the issue was remanded to the TPO for fresh consideration with certain directions in paragraph-31 of the order in Swiss Re shared Services India Pvt. Ltd. (supra). The contention of the learned DR is found to be correct and in the case of Swiss Re Shared Services India Pvt. Ltd. (supra), the Tribunal has remanded the issue to verify segmental details of this company. Accordingly, we direct the TPO to consider the segmental details of BPO alone as was directed in the case of Swiss Re shared Services India Pvt. Ltd.(supra) and also other directions given in

paragraph-31 of the aforesaid decision. With regard to exclusion of Acropetal Technologies Ltd., is concerned, following the tribunal order referred to by the learned AR, we direct exclusion of the aforesaid company.

21. As far as the company ICRA Online Ltd. is concerned, this tribunal in the case of M/s. Zyme solutions Pvt. Ltd. Vs. ACIT IT(TP) A.No.85/Bang/2016 for AY 2011-12 order dated 28.4.2017 in paragraph-26 of its order was pleased to remand to TPO/AO for fresh consideration, the comparability of this company with the Assessee. Following the said decision, we set aside the order of the AO in this regard and remand to the TPO/AO for fresh consideration the comparability of this company with the Assessee on the lines indicated in the order in the case of M/s. Zyme solutions Pvt. Ltd. (supra).

22. As far as the comparability of the company iGate Global Solutions Ltd., is concerned, the argument of the learned counsel for the Assessee was that segmental details of this company were not available and therefore comparability of this company with the Assessee cannot be ascertained. The learned DR prayed that the comparability of this company can be remanded to the TPO/AO to enable them to issue notices u/s.133(6) of the Act to get the required segmental details to consider the comparability of this company. We accept the prayer of the learned DR and remand for consideration afresh the comparability of this company by the TPO/AO after exercising powers u/s.133(6) of the Act.

23. The AO/TPO is directed to determine the ALP in the SWD segment as well as in the ITES segment on lines indicated in this order after affording Assessee opportunity of being heard.

24. The other issue that requires consideration in the Revenue's appeal is with regard to the direction of the CIT(A) to exclude from the total turnover whatever is excluded from the export turnover of the Assessee while computing deduction u/s.10A of the Act. The grievance of the revenue in this regard is projected in Gr.No.5 & 6 of the grounds of appeal raised by the revenue.

25. The AO excluded from the total turnover telecommunication expenses and travel and other expenses attributable to the delivery of articles or things or computer software outside India from the total turnover without excluding them from the Export Turnover of the Assessee. Consequently, the deduction u/s.10A of the Act was allowed at a lesser sum than what was claimed by the Assessee. The CIT(A) appeal however held that whatever is excluded from export turnover should also be reduced from the total turnover while allowing deduction u/s.10A of the Act. The revenue is in appeal against the aforesaid direction of the CIT(A). It is not in dispute before us that the Hon'ble Karnataka High Court in the case of CIT Vs. Tata Elxsi Ltd., 349 ITR 98 (Karnataka) has held that whatever is excluded from the export turnover should also be excluded from the total turnover while computing deduction under section 10A of the Act. This view of the Hon'ble Karnataka High Court has been upheld by the Hon'ble Supreme Court in the case of CIT Vs. HCL Technologies Ltd., (2018) 93 taxmann.com 33 (SC). In view of the above, we hold that telecommunication charges should be excluded both from the export turnover as well as from the total turnover and deduction under section 10A computed accordingly.

26. In the result, the appeal by the Assessee is partly allowed, while the appeal by the revenue is dismissed.

Pronounced in the open court on this 27<sup>th</sup> day of November, 2019.

**Sd/-**  
**(A.K.GARODIA)**  
**Accountant Member**

**Sd/-**  
**( N.V. VASUDEVAN)**  
**Vice-President**

Bangalore,  
Dated, the 27<sup>th</sup> November, 2019.

\*/NS/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar  
ITAT, Bangalore.